

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHAYLENE SUSAN NEWBY,  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

Case No. [17-cv-00104-MEJ](#)

**ORDER RE: CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

Plaintiff Shaylene Susan Newby (“Plaintiff”) brings this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of a final decision of Defendant Commissioner of Social Security (“Defendant”) denying Plaintiff’s claim for disability benefits. Pending before the Court are the parties’ cross-motions for summary judgment. Dkt. Nos. 16, 17. Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers without oral argument. Having carefully reviewed the parties’ positions, the Administrative Record (“AR”), and the relevant legal authority, the Court hereby **GRANTS IN PART** Plaintiff’s Motion and **DENIES** Defendant’s Cross-Motion for the reasons set forth below.

**BACKGROUND**

Plaintiff was born on October 11, 1955. AR 66. She graduated from high school where she was enrolled in regular classes. AR 37. After high school, Plaintiff received no other formal education and no type of job training. AR 37-38. Plaintiff’s prior work included positions as a caregiver, mortgage clerk, and reception clerk. AR 38, 245.

Plaintiff was diagnosed with diabetes mellitus type II and neuropathy in April 2013. AR 544-47. Plaintiff reported being significantly fatigued starting in January 2014, and explained she

was falling nearly every day. AR 481. Plaintiff was first diagnosed with chronic fatigue syndrome in May 2014. AR 546, 481. While supplements initially improved Plaintiff's condition and she did not fall for two to three months, she was still very fatigued and would nap frequently. AR 481. In approximately August 2014, Plaintiff started falling again. *Id.* She was diagnosed with severe anemia, which made her weak and was most likely the cause of her falls. AR 483; *see also* AR 546. Plaintiff received acupuncture and other treatment for anemia, chronic fatigue syndrome, and neuropathy. AR 544-47.

### **SOCIAL SECURITY ADMINISTRATION PROCEEDINGS**

On May 15, 2014, Plaintiff filed a claim for Disability Insurance Benefits, alleging disability beginning on April 15, 2014. AR 209–24, 244. On September 18, 2014, the Social Security Administration ("SSA") denied Plaintiff's claim, finding that Plaintiff did not qualify for disability benefits. AR 12. Plaintiff subsequently filed a request for reconsideration, which was denied on March 17, 2015. AR 12. On April 7, 2015, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). AR 12, 138. ALJ Mary Beth O'Connor conducted a hearing on July 15, 2016. AR 30. Plaintiff testified in person at the hearing and was represented by a client representative, Dan McCaskell. AR 30.

#### **A. Plaintiff's Testimony**

At the time of the hearing, Plaintiff was using a wheelchair because she had recently broken her leg. AR 40-41. Her doctors expected her to make a full recovery. AR 41. In the past, she had used a cane to help her with her balance, but the cane had not been prescribed by her treaters. AR 41. She used the cane "once in a while" when she "felt fatigued" and it helped her not to fall. AR 41 (she used the cane for part of the day maybe ten days per month). Plaintiff's use of a cane does not appear in her medical records, but she did discuss it with her treaters. AR 40-41.

Plaintiff testified that she was prevented from working by chronic fatigue syndrome, exhaustion, memory loss, difficulty holding a memory or a conversation for very long, and physical fatigue. AR 42. During a typical day, Plaintiff gets up, probably showers, eats, and lays

down and rests for a while; then hopefully, she has enough energy to get up and perform a household task, after which she lays down to take another nap. AR 43. She does not have the strength to hold her three-year-old granddaughter or her one-year old grandson. AR 50. Although her fatigue improved when her doctor began treating her anemia, Plaintiff still suffers from symptoms due to her chronic fatigue. AR 43-44. Plaintiff is not taking medication from chronic fatigue. AR 44.

If she moves for 15 minutes, Plaintiff hurts and is short of breath; she must sit down and rest for a few minutes. AR 44. She can sit for an hour, but after that her body gets stiff and she wants to get up and move around; if she can get up and move around for a minute or two, she can sit back down again. AR 46.

Plaintiff suffers from memory loss: she is unable to bring up “something of the past” in conversation, forgets what she wants to say, reads the same page more than once, or the same sentence more than once. AR 45, 48. Plaintiff did not report her memory issues to her doctor. AR 49. She testified that the “inability to hold a thought very long to be able to process all the steps that might be involved in [learning new computer software or programs] would be extremely challenging.” AR 63.

## **B. Material Medical Evidence of Record**

### **1. Primary Care Providers (*passim*)**

Family Nurse Practitioner Pamela Blaufarb is listed as Plaintiff’s primary care provider starting in May 2013 through at least March 2015. *See* Exs. 1/F, 2/F, 8/F, 10/F. Nurse Blaufarb noted on every progress note that Plaintiff presented a “psychologically appropriate mood and affect.” *See id.* In October 2013, she noted Plaintiff was “positive for depression, but improving.” AR 423. In January 2014, she recommended increasing Plaintiff’s Amitriptyline dosage as it “may not only help your neuropathy but will help your sleep.” AR 422. Although Plaintiff had made appointments because of “anxiety and depression” in June 2014, Nurse Blaufarb consistently diagnosed Plaintiff with chronic fatigue syndrome (“CFS”), not depression. AR 546. In March 2015, Nurse Blaufarb completed a CFS Residual Function Capacity (“RFC”)

1 Questionnaire for Plaintiff in connection with Social Security Disability proceedings. *See* Ex. 8/F.  
2 When asked to list whether Plaintiff had “other diagnoses,” Nurse Blaufarb listed a number of  
3 diagnoses, but did not include depression. AR 524. She explicitly excluded any psychiatric  
4 impairments as a cause for Plaintiff’s fatigue, although she noted there was “some depression.”  
5 AR 525. She reported Plaintiff’s self-report of short term memory or concentration impairment  
6 as part of Plaintiff’s CFS symptoms. AR 525. She also concluded that Plaintiff would be  
7 incapable of even a low stress job because of “depression and overwhelming fatigue.” AR 526.

8 In September 2015, Physician’s Assistant (“PA”) Carlo Ferrarone assessed Plaintiff as  
9 suffering from depression, marked by fatigue, daily sadness, insomnia, lack of  
10 concentration/memory, and referred Plaintiff for a mental health consultation. AR 593.  
11 September 2015 is the first time any of Plaintiff’s providers added “depression” to her listed  
12 diagnoses. *See* AR 543-47. PA Ferrarone also mentioned that Plaintiff’s use of antidepressants  
13 correlates to better sleep (AR 592), but did not identify the antidepressant Plaintiff takes.

14 2. Dr. Melody Samuelson, Psy. D. (Ex. 4/F)

15 On August 30, 2014, Dr. Samuelson performed a complete mental status evaluation  
16 (“MSE”) of Plaintiff on behalf of the SSA. AR 458-465. She noted Plaintiff had no history of  
17 mental health treatment, is on medication for physical problems, and denies any in- or out-patient  
18 treatment for psychiatric conditions. AR 459.

19 Plaintiff reported a history of diabetes and CFS. Plaintiff reported she could take care of  
20 self-dressing, self-bathing, and personal hygiene, but she has difficulty completing complex  
21 household tasks that require endurance. AR 459-60. She is able to pay bills and manage cash  
22 appropriately, but she has difficulty maintaining focus or making complex decisions. AR 460.  
23 She can go out alone; she has poor relationships with friends and family. AR 460. She needs  
24 assistance with transportation on occasion, but is still able to drive. AR 458, 460. She is too  
25 fatigued to shop and drive. AR 460. She is extremely limited in outside activities, but will go to  
26 an occasional movie. AR 460.

27 Dr. Samuelson observed that Plaintiff was coherent and organized, showed no tangentiality  
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1 or loosening of associations, and was relevant and non-delusional. AR 460. She noted Plaintiff's  
2 mood was moderately depressed and her affect mildly flat and congruent with thought content;  
3 Plaintiff reported feelings of depression but denied any suicidal ideation. AR 461. Her speech  
4 and orientation to time, place, and purpose were normal. AR 461. Her memory immediately upon  
5 presentation and after delay was four out of four; she could identify the President of the United  
6 States, could describe Martin Luther King, Jr., and knew the components of water. AR 461.  
7 Plaintiff was not able to identify the location of the Sahara Desert. AR 461. Plaintiff could count  
8 backwards from 20, could count the months of the year backwards, could perform simple  
9 calculations without using her fingers to assist; however, she was unable to perform these tasks  
10 without repeating instructions. AR 461. Her insight and judgment was intact. AR 461.

11 Dr. Samuelson diagnosed Plaintiff as suffering from Cognitive Disorder Not Otherwise  
12 Specified ("NOS") and Major Depressive Disorder; she deemed Plaintiff's condition "fair" from a  
13 psychiatric standpoint. AR 462. Dr. Samuelson found Plaintiff to be moderately limited in in her  
14 ability to: 1) understand, remember, and carry out simple one- or two-step job instructions; 2) do  
15 detailed and complex instructions; 3) relate and interact with co-workers and public; 4) maintain  
16 concentration and attention, persistence, and pace; 5) associate with day-to-day work activity,  
17 including attendance and safety; 6) accept instructions from supervisors; 7) maintain regular  
18 attendance in the work place and perform activities on a consistent basis; and 8) perform work  
19 activities without special or additional supervision. AR 463. She assessed Plaintiff's Global  
20 Assessment of Functioning ("GAF") as 44. AR 462.

21 3. Dr. Daniel Creegan, Psy. D. (Ex. 10/F)

22 Dr. Creegan examined Plaintiff on October 15, 2015 after PA Ferrarone referred Plaintiff  
23 for a mental health screening. AR 582-583, 593. Plaintiff indicated she wanted to give therapy a  
24 try after her doctor recommended it. AR 582 ("I would like to increase happiness, decrease  
25 sadness."). After performing a depression screening, Dr. Creegan assessed Plaintiff as suffering  
26 from "mild depression." AR 582. He also noted Plaintiff was homeless. AR 582-83.

27 Plaintiff's MSE that day was normal: she was alert and oriented; her appearance

appropriate; her attitude cooperative; her speech normal; her thought content appropriate and logical; her cognitive functioning intact; her behavior and affect appropriate; her thought processes intact, coherent, and appropriate; she reported no memory problems; her motor activity appropriate; her abstraction intact; her insight appropriate, thoughtful, and reflective; her judgment intact; and s no disturbances of perception. AR 583. Her mood was euthymic. AR 583. Dr. Creegan diagnosed depression and recommended individual therapy, as well as attending a depression group. AR 583. There is no indication in the record that Plaintiff attended individual therapy sessions or joined a depression group. *See* AR. There is also no indication Dr. Creegan prescribed medication for her depression.

### C. The ALJ's Findings

The regulations promulgated by the Commissioner of Social Security provide for a five-step sequential analysis to determine whether a Social Security claimant is disabled.<sup>1</sup> 20 C.F.R. § 404.1520. The sequential inquiry is terminated when “a question is answered affirmatively or negatively in such a way that a decision can be made that a claimant is or is not disabled.” *Pitzer v. Sullivan*, 908 F.2d 502, 504 (9th Cir. 1990). During the first four steps of this sequential inquiry, the claimant bears the burden of proof to demonstrate disability. *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five, the burden shifts to the Commissioner “to show that the claimant can do other kinds of work.” *Id.* (quoting *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

The ALJ must first determine whether the claimant is performing “substantial gainful activity,” which would mandate that the claimant be found not disabled regardless of medical condition, age, education, and work experience. 20 C.F.R. §§ 404.1520(a)(4)(i), (b). Here, the ALJ determined that Plaintiff had not performed substantial gainful activity since April 15, 2014. AR 14.

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<sup>1</sup> Disability is “the inability to engage in any substantial gainful activity” because of a medical impairment which can result in death or “which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A).

At step two, the ALJ must determine, based on medical findings, whether the claimant has a “severe” impairment or combination of impairments as defined by the Social Security Act. 20 C.F.R. § 404.1520(a)(4)(ii). If no severe impairment is found, the claimant is not disabled. 20 C.F.R. § 404.1520(c). Here, the ALJ determined that Plaintiff had the following severe impairments: diabetes mellitus, peripheral neuropathy, anemia, and chronic fatigue. AR 14.

If the ALJ determines that the claimant has a severe impairment, the process proceeds to the third step, where the ALJ must determine whether the claimant has an impairment or combination of impairments that meet or equals an impairment listed in 20 C.F.R. Part 404, Subpt. P, App. 1 (the “Listing of Impairments”). 20 C.F.R. § 404.1520(a)(4)(iii). If a claimant’s impairment either meets the listed criteria for the diagnosis or is medically equivalent to the criteria of the diagnosis, he is conclusively presumed to be disabled, without considering age, education and work experience. 20 C.F.R. § 404.1520(d). Here, the ALJ determined that Plaintiff did not have an impairment or combination of impairments that meets the listings. AR 18.

Before proceeding to step four, the ALJ must determine the claimant’s RFC. 20 C.F.R. § 404.1520(e). RFC refers to what an individual can do in a work setting, despite mental or physical limitations caused by impairments or related symptoms. 20 C.F.R. § 404.1545(a)(1). In assessing an individual’s RFC, the ALJ must consider all of the claimant’s medically determinable impairments, including the medically determinable impairments that are nonsevere. 20 C.F.R. § 404.1545(e). Here, the ALJ determined that Plaintiff has the RFC to “perform sedentary work as defined in 20 CFR [§] 404.1567(a) and 416.967(a) except that she is able to occasionally climb ramps and stairs; never climb ropes, ladders, and scaffolds; and occasionally crawl. The claimant should avoid concentrated exposure to extreme heat and avoid all unprotected heights or moving mechanical parts.” AR 18.

The fourth step of the evaluation process requires that the ALJ determine whether the claimant’s RFC is sufficient to perform past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv); 404.1520(f). Past relevant work is work performed within the past 15 years that was substantial gainful activity, and that lasted long enough for the claimant to learn to do it. 20 C.F.R. §

404.1560(b)(1). If the claimant has the RFC to do his past relevant work, the claimant is not disabled. 20 C.F.R. § 404.1520(a)(4) (iv). Here, the ALJ determined that Plaintiff could perform past relevant work as a mortgage clerk and as a receptionist. AR 23.

In the fifth step of the analysis, the burden shifts to the Commissioner to prove that there are other jobs existing in significant numbers in the national economy which the claimant can perform consistent with the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g); 404.1560(c). The Commissioner can meet this burden by relying on the testimony of a vocational expert or by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404, Subpt. P, App. 2. *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). Here, based on the testimony of the vocational expert, Plaintiff's age, education, work experience, and RFC, the ALJ determined that "the claimant retains the residual functional capacity to perform the jobs of mortgage clerk and receptionist as the jobs are generally performed. The [ALJ] relied on the statement of the vocational expert that her testimony was consistent with the information provided in the" Dictionary of Occupational Titles. AR 24.

#### **D. The ALJ's Decision and Plaintiff's Appeal**

On September 1, 2016, the ALJ issued an unfavorable decision finding that Plaintiff was not disabled. AR 9–11. This decision became final when the Appeals Council declined to review it on November 8, 2016. AR 1–3. Having exhausted all administrative remedies, Plaintiff commenced this action for judicial review pursuant to 42 U.S.C. § 405(g). On May 22, 2017, Plaintiff filed the present Motion for Summary Judgment. On June 19, 2017, Defendant filed a Cross-Motion for Summary Judgment.

### **LEGAL STANDARD**

This Court has jurisdiction to review final decisions of the Commissioner pursuant to 42 U.S.C. § 405(g). The ALJ's decision must be affirmed if the findings are "supported by substantial evidence and if the [ALJ] applied the correct legal standards." *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (citation omitted). "Substantial evidence means more than a scintilla but less than a preponderance" of evidence that "a reasonable person might accept as



adequate to support a conclusion.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (quoting *Flaten v. Sec’y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995)). The court must consider the administrative record as a whole, weighing the evidence that both supports and detracts from the ALJ’s conclusion. *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989). However, “where the evidence is susceptible to more than one rational interpretation,” the court must uphold the ALJ’s decision. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Determinations of credibility, resolution of conflicts in medical testimony, and all other ambiguities are to be resolved by the ALJ. *Id.*

Additionally, the harmless error rule applies where substantial evidence otherwise supports the ALJ’s decision. *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990). A court may not reverse an ALJ’s decision on account of an error that is harmless. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th Cir. 2006)). “[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency’s determination.” *Id.* (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

## DISCUSSION

An ALJ may only reject an examining doctor’s opinions for specific and legitimate reasons based on substantial evidence of record. *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995). Here, the ALJ gave “no weight” to Dr. Samuelson’s assessments for several reasons, and Plaintiff contends most of these reasons were not supported by substantial evidence. Plaintiff does not contend the ALJ erred at Step 2 of the sequential analysis; instead, she argues that the ALJ failed to properly evaluate her mental impairments in combination with her other functional limitations, which together should have warranted a disability finding. Pl.’s Mot. at 9. Plaintiff also argues the ALJ erred by not posing to the VE any hypotheticals that included the moderate limitations Dr. Samuelson had found. *See Reply* at 7.

**A. Plaintiff's Arguments<sup>2</sup>**

**1. Diagnosis Unsupported by Clinical Findings**

First, the ALJ discounted Dr. Samuelson's diagnosis of a cognitive disorder because it was based on Plaintiff's complaint that she was struggling with memory function, but the MSE Dr. Samuelson administered did not disclose memory problems. Plaintiff was able to recall items immediately and after a delay, and she could identify the President of the United States. The ALJ also found the results of the MSE, which were normal but for Plaintiff's mood, which was depressed with a flat affect, did not support Dr. Samuelson's assessment. AR 16.

Plaintiff argues Dr. Samuelson's assessment was in fact based on abnormal clinical findings: Plaintiff only performed the memory drills after repeated instructions, and she could not answer on what continent the Sahara Desert is located. Pl.'s Mot. at 7 (citing AR 461). Furthermore, Dr. Samuelson noted Plaintiff's "mood was moderately depressed and her affect was mildly flat with congruent thought content" and that she expressed feelings of hopelessness, helplessness, and/or worthlessness—all of which Plaintiff argues are abnormal MSE findings. Pl.'s Mot. at 7. Plaintiff also argues that "an individual who completed non-special education high school education would presumably know" where the Sahara Desert was located.<sup>3</sup> Pl.'s Mot. at 7.

**2. No History of Treatment**

Second, the ALJ discounted Dr. Samuelson's opinion because Plaintiff had no history of hospitalization or inpatient care for any emotional disorder. She was evaluated by Dr. Creegan who reported normal MSE results, diagnosed "mild depression" after administering a depression

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<sup>2</sup> The ALJ also discounted Dr. Samuelson's opinion because state agency consultants determined Plaintiff's affective disorders and cognitive disorders were non-severe. AR 17 (citing Exs. 1A, 2A, 5A, and 6A). The consultants determined Plaintiff's emotional and cognitive conditions did not lead to a loss of ability for basic work activity. AR 17. Plaintiff does not challenge this reason the ALJ articulated for discounting Dr. Samuelson's opinion. See Pl.'s Mot.

<sup>3</sup> The Court finds this presumption is unwarranted. See, e.g., U.S. Gov't Accountability Office, GAO-16-7, *Most Eighth Grade Students Are Not Proficient in Geography* (2015); Max Fisher, *Half of Americans can't identify Syria on a map (young Republicans do slightly better)*, Wash. Post (April 26, 2013), [https://www.washingtonpost.com/news/worldviews/wp/2013/04/26/half-of-americans-cant-identify-syria-on-a-map-young-republicans-do-slightly-better/?utm\\_term=.d8152a055743](https://www.washingtonpost.com/news/worldviews/wp/2013/04/26/half-of-americans-cant-identify-syria-on-a-map-young-republicans-do-slightly-better/?utm_term=.d8152a055743).

test questionnaire (“PHQ”), and recommended “very conservative care” through therapy. AR 16. Plaintiff’s treating physicians did not report any significant emotional symptoms, and there is no evidence of treatment for emotional symptoms. AR 17.

Plaintiff argues that “[i]t is well established that primary care physicians (those in family or general practice) ‘identify and treat the majority of Americans’ psychiatric disorders.” Pl.’s Mot. at 7 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). She asserts that the ALJ’s rationale is invalid because treatment for psychiatric disorders can be administered by primary care physicians and not just a board-certified psychiatrist or psychologist. *Id.* at 8. Plaintiff argues that—like in *Sprague*—her primary care physicians identified and treated her depressive symptoms as her records show that she medicated with the anti-depressant, Amitriptyline. *Id.* (citing AR 307, 345, 357). Plaintiff “periodically reported depression and anxiety to her primary care medical source.” *Id.* (citing AR 385 (listing acupuncture, anxiety and depression as reasons for appointment in June 2014), 392 (same), 423 (positive for depression but improving in October 2013), 543–46 (diagnosis of depression added in October 2015), 586 (diagnosis of depression noted in February 2016), 593 (mental health referral to Dr. Creegan)). She contends she was referred to Dr. Creegan because of her “unremitting depressive symptoms” and argues this referral would not have been necessary if Plaintiff’s mental impairments were only mild/non-severe. *Id.* at 8 (citing AR 582–83).<sup>4</sup> Plaintiff argues that Dr. Creegan offered no contrary opinions to those of Dr. Samuelson and that Dr. Creegan’s recommendation for individual and group therapy indicates Plaintiff’s depression was not mild. *Id.*<sup>5</sup>

## **B. Analysis**

As an initial matter, many of Plaintiff’s arguments are not supported by evidence in the

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<sup>4</sup> The Court observes Dr. Creegan noted that Plaintiff was referred to a mental health consult because of “chronic disease: diabetes, chronic fatigue and anemia” – not “unremitting depressive symptoms.” AR 582.

<sup>5</sup> Plaintiff offers no support for her “presumption” that only persons with severe depression attend individual and/or group therapy.

record. For example, Plaintiff does not cite, and the Court did not find, any evidence that a doctor prescribed Amitriptyline for depression; the only explanation for the prescription is that it would help Plaintiff with neuropathy and sleep. AR 422.<sup>6</sup> Similarly, while Plaintiff listed “depression” as one of the reasons for several of her appointments in June 2014, and while Nurse Blaufarb mentioned “some depression” in 2013 and 2014, it is not until September 2015 that depression is listed as a diagnosis in Plaintiff’s records. There simply is no evidence in the record that Plaintiff’s primary care provider treated her for depression. The AR documents a single mental health consultation, with no evidence Plaintiff attended the recommended individual therapy sessions. During that mental health intake, Dr. Creegan performed a mental status exam and noted that Plaintiff’s thought content and process were appropriate and coherent, and that Plaintiff reported no memory problems. AR 582. The Court thus finds the evidence in the record does not establish Plaintiff’s depression was severe or disabling in and of itself, and that the ALJ’s finding that Plaintiff’s depression was non-severe is supported by substantial evidence.

Nevertheless, the record shows that Nurse Blaufarb indicated Plaintiff had experienced episodes of depression, PA Ferrarone referred Plaintiff for a mental health consultation after assessing Plaintiff for depression, and Dr. Creegan diagnosed Plaintiff as suffering from mild depression. The record thus does establish Plaintiff suffered from depression. Indeed, the ALJ concluded the medical findings were “consistent with respect to the existence of a depressive disorder but the abnormal clinical signs are not of a level to preclude basic work activity.” AR 17. Concluding that Plaintiff’s depression was non-severe, the ALJ did not evaluate the impact of Plaintiff’s depression when evaluating Plaintiff’s RFC. *See* AR 17-23. Nurse Blaufarb reported Plaintiff was not a malingerer, emotional factors contributed to the severity of her symptoms and physical limitations, Plaintiff’s impairments were reasonably consistent with the symptoms and functional limitations described in the questionnaire, Plaintiff’s symptoms would frequently

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<sup>6</sup> Plaintiff represents that she takes this medication for depression (*see* AR 307), but does not identify any records showing this medication was prescribed for depression rather than neuropathy and sleep.

interfere with the attention and concentration needed to perform even simple work tasks, and Plaintiff's depression and overwhelming fatigue prevented her from tolerating even a loss stress job. AR 525-26. Dr. Samuelson opined Plaintiff was moderately limited in a number of functional areas. AR 462-63. After discounting Dr. Samuelson's and Dr. Creegan's opinions, the ALJ found Plaintiff had mild limitations in concentration, persistence, or pace. AR 17. But while the ALJ explicitly addressed Dr. Samuelson's findings regarding the impact of Plaintiff's depression on her ability to work, the ALJ did not address Nurse Blaufarb's March 2015 opinion that Plaintiff's depression contributed to Plaintiff's total inability to work.<sup>7</sup>

The ALJ was required to consider the impact (if any) of Plaintiff's non-severe depression when assessing Plaintiff's RFC. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008) (ALJ must consider limitations imposed by all of claimant's impairments when assessing RFC, even those that are not severe: "Even though a non-severe impairment standing alone may not significantly limit an individual's ability to do basic work activities, it may—when considered with limitations or restrictions due to other impairments—be critical to the outcome of a claim"); *see also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (error for ALJ not to consider how non-severe symptoms of fatigue and pain, which affected claimant's ability to perform work activities, affected claimant's RFC). The ALJ failed to address Plaintiff's non-severe depression when evaluating her RFC. The Court cannot find this error was harmless. For example, the ALJ did not address Nurse Blaufarb's opinion regarding the impact of Plaintiff's depression elsewhere in her decision. The ALJ also did not include any non-exertional limitations in Plaintiff's RFC that could take into account the potential impact of Plaintiff's depression on her attention and concentration, which Nurse Blaufarb opined would be "frequently" affected by Plaintiff's "fatigue or other symptoms" – which include depression. *See* AR 18, 526.

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<sup>7</sup> The ALJ addresses Nurse Blaufarb's CFS Questionnaire, but does not acknowledge Blaufarb's statement that her conclusion that Plaintiff is incapable of performing even a low stress job is based on "depression and overwhelming fatigue." *Compare* AR 526 with AR 20-22 (analyzing Ex. 8/F).

1 The Court must remand this matter for further administrative proceedings so that the ALJ  
2 can evaluate whether Plaintiff's non-severe depression affects Plaintiff's RFC. The ALJ shall  
3 further develop the record if necessary.

4 **CONCLUSION**

5 In reviewing a Social Security Commissioner's decision, a court may remand the case  
6 "either for additional evidence and findings or to award benefits." *Smolen*, 80 F.3d at 1292.  
7 Typically, when a court reverses an ALJ's decision, "the proper course, except in rare  
8 circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v.*  
9 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Moreover, "[r]emand for further  
10 proceedings is appropriate where there are outstanding issues that must be resolved before a  
11 disability determination can be made, and it is not clear from the record that the ALJ would be  
12 required to find the claimant disabled if all the evidence were properly evaluated." *Taylor v.*  
13 *Comm'r of Soc. Sec.*, 659 F.3d 1228, 1235 (9th Cir. 2011) (reversing and remanding for the  
14 consideration of new evidence instead of awarding benefits).

15 The Court concludes this case should be remanded for further administrative proceedings  
16 for the reasons stated above. In addition, because this evidence may affect other portions of the  
17 decision, the ALJ shall determine if any further evaluation is required based on the issues Plaintiff  
18 raises here. For these reasons, the Court **GRANTS IN PART** Plaintiff's Motion for Summary  
19 Judgment, **DENIES** Defendant's Cross-Motion for Summary Judgment, and **REVERSES** the  
20 ALJ's decision. This case is **REMANDED** for further administrative proceedings in accordance  
21 with this Order.

22 **IT IS SO ORDERED.**

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24 Dated: August 22, 2017

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27 MARIA-ELENA JAMES  
28 United States Magistrate Judge